

January 11, 2005

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, D.C. 20554

Re: Core Communications, Inc. Petition for Forbearance Under  
47 U.S.C. § 160(c) from Application of the ISP Remand  
Order, WC Docket No. 03-171

Dear Ms. Dortch:

Pac-West Telecomm, Inc. ("Pac-West"), files this response to the Petition for Reconsideration of the *Core Forbearance Order*<sup>1</sup> filed by SBC Communications, Inc. on November 17, 2004 ("SBC Petition"), the Comments of Qwest Corporation in Support of Petition for Reconsideration filed on December 1, 2004 ("Qwest Comments"), and the Ex Parte Letter filed by Verizon on December 17, 2004 in support of the SBC Petition ("Verizon Letter"). In all three cases, the Bell monopolies attempt to tell a story of compensation to CLECs that would result in ruin, a story that they first spun in 2001 that is demonstrably untrue. Their filings fail to provide any basis under the Commission's rules for the Commission to reconsider the *Core Forbearance Order*. Because nothing in the Bell monopolies' filings represents findings

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<sup>1</sup> *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, WC Docket No. 03-171, Order, FCC 04-241(rel. Oct. 18, 2004) ("*Core Forbearance Order*").

of fact and/or conclusions of law by the Commission that are erroneous,<sup>2</sup> the SBC Petition should be denied.

1. The SBC Petition asserts that the Commission erred by ruling that “the policies favoring a unified compensation regime outweigh any remaining concerns about the growth of dial-up Internet traffic.”<sup>3</sup> Despite what the Bell monopolies’ suggest, the Commission did not base its decision on the fact that there was no longer any growth in dial-up Internet traffic, but rather whatever growth there may be was outweighed by other policy concerns. Further, the “problem” that the *ISP Remand Order*<sup>4</sup> was intended to solve was always more fiction than fact. The *ISP Remand Order* ostensibly addressed “a need for immediate action with respect to ISP-bound traffic” by “seeking to remedy an exigent market problem” and to “curtail a pressing problem.” When the *ISP Remand Order* was released in 2001, the Commission felt that the new interim compensation regime was necessary to prevent widespread “regulatory arbitrage” that it claimed existed prior to the *ISP Remand Order*. Yet SBC, the second-largest Bell monopoly in the United States, serving more than 60 million access lines, waited more than two years after it became effective before it adopted the interim compensation regime. See SBC Communications, Inc., Annual Report 2002 (Mar. 14, 2003) (“To date, none of our wireline subsidiaries have opted into the transition plan.”) Even though SBC prevailed by having the Commission impose a drastic regulatory framework on CLECs, SBC elected to maintain the status quo ante rather

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<sup>2</sup> 47 C.F.R. §1.106(d).

<sup>3</sup> *Core Forbearance Order* at ¶ 20.

<sup>4</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001), *remanded*, *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. den.* 538 U.S. 1012 (2003) (“*ISP Remand Order*”).

than comply with the requirements of the new interim compensation regime. SBC's conduct with respect to the interim compensation regime proved that the interim compensation regime was not necessary.<sup>5</sup> Quite obviously, the "market problem" was neither "exigent" nor "pressing" for SBC. If SBC were in need of the relief offered by the new federal intercarrier compensation regime, SBC would have adopted the regime as soon as possible in 2001. SBC's conduct proves that the alleged conditions in the marketplace underlying the *ISP Remand Order* never did exist.

Nevertheless, to concoct its argument in favor of reconsideration, SBC jumps from the Commission's observation of "declining usage of dial-up ISP services" into an assertion that there was no evidence in the record that dial-up ISP minutes have declined since release of the *ISP Remand Order*. SBC Petition at 6. Nobody doubts that the total number of dial-up users has declined steadily since 2002. As Pac-West stated on October 6, 2004, "the annual reports of major ISPs including Earthlink, AOL, and NetZero confirm that dial-up subscribership is in a period of retraction, not growth."<sup>6</sup> That fact in itself justifies the Commission's conclusion: there is declining usage of dial-up ISP services in terms of number of subscribers. Unless there is some legitimate reason to presume that usage patterns for dial-up customers will change in the future, a declining subscriber base is a reasonable proxy for declining dial-up minutes.

To argue for reconsideration, however, SBC suggests that dial-up minutes are actually increasing even though the total number of users is in steady decline. SBC bases this position on the October 1, 2004 *ex parte* letter by BellSouth, incorporating a study of dial-up ISP traffic by

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<sup>5</sup> SBC, however, decided to invoke the FCC compensation regime in the second half of 2003, for reasons known only to SBC.

<sup>6</sup> Letter from Patrick J. Donovan, Counsel for Pac-West Telecomm, Inc., to Marlene R. Dortch, Federal Communications Commission, WC Docket No. 03-171, dated October 6, 2004, at 2.

In-Stat/MDR. SBC Petition at 7. Yet a closer look at that data shows that it appears to use assumptions well out of the mainstream that compromise the validity of the analysis. To illustrate, the BellSouth *ex parte* posits that in the year 2005, there will be 50.0 million dial-up ISP subscribers generating 1.980 trillion MOUs per year. If these figures are to be believed, they mean that on average, every single dial-up ISP subscriber in the U.S. will spend one hour and forty-eight minutes on-line every single day of the year.<sup>7</sup> For some unexplained reason, that time spent online increases in the In-Stat/MDR study to the point that every dial-up ISP subscriber is surfing the Internet for one hour and fifty-four minutes every day of the year in 2008. These assumptions of time spent on-line nearly double the time on-line by dial-up subscribers seen in the sky-is-falling complaints from the Bell monopolies earlier in the reciprocal compensation proceedings.<sup>8</sup> Further undermining the credibility of the figures on which the Bell monopolies rely, the NTIA has reported that only 51.2% of Internet users with dial-up Internet access at home access the Internet on a daily basis.<sup>9</sup> That means, on average, each dial-up Internet access session must be considerably longer than the 108 minutes calculated on a straight-line basis. It is illogical to think that dial-up minutes will increase for each subscriber when the high-volume users of the Internet have already left dial-up access and have migrated to broadband access, and will continue to leave dial-up access as broadband becomes more widely available and more competitively priced.

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<sup>7</sup> 1.980 trillion minutes/year ÷ 365 days/year ÷ 50.0 million subscribers = 108 minutes per subscriber per day.

<sup>8</sup> Verizon asserted that all dial-up ISP subscribers spend one hour on-line every day. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket No. 96-98, CC Docket No. 99-68, Comments of Verizon Communications, at 12 (filed July 21, 2000).

<sup>9</sup> NTIA, *A Nation Online: Entering the Broadband Age* at 8 (Sep. 2004).

None of the Bell monopolies adequately explains how dial-up usage patterns have changed to result in each dial-up subscriber spending more time on-line than they did several years ago. SBC tosses out the casual speculation that “[i]t is entirely possible that a smaller base of dial-up subscribers would spend more time on-line, particularly as more and more people incorporate the Internet into their daily lives.” SBC Petition at 6-7. This statement makes no sense: more and more people certainly could be incorporating the Internet into their daily lives, but this does not mean that each of those people (a) is using a dial-up connection and (b) is spending vastly greater amounts of time on-line than earlier users. Verizon suggests that “the increasing array of information and services available over the Internet since 2001” accounts for more time spent on-line, especially since dial-up users “must remain online longer than broadband users to obtain the same content.” Verizon Letter at 5. Yet the source cited by Verizon makes clear that “The greater number of online activities in which individuals engage, the higher the likelihood they will have broadband at home.” NTIA Report at 8. In other words, it is more likely that end users accessing the “increasing array” of information on the Internet are not using dial-up connections. As for dial-up users remaining on-line longer to obtain the same content, most high-bandwidth-content websites offer low-speed streaming or transfer rates solely to accommodate dial-up users.<sup>10</sup> In short, the mere existence of more content or more high-

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<sup>10</sup> See, e.g., <http://www.williamshatnerhasbeen.com/>. Some websites, such as <http://launch.yahoo.com/musicvideos/>, automatically detect an end user’s connection speed in order to minimize download times. Some actually discourage access by dial-up connections by recommending use of a broadband connection to access the content offered. See, e.g., <http://www.shrek2.com/> (“This site is best experienced. . . with a broadband Internet connection[.]”), or <http://www.rhapsody.com/faq.jsp?sect=main#12> (“*Do I need a broadband Internet connection?* Yes, we recommend using a broadband connection with RHAPSODY to get a CD-quality listening experience without interruptions. Dial-up members can use our service and listen to on-demand tracks and radio at 20kbps, but may experience listening interruptions due to Internet congestion and the limits of lower speeds with narrowband connections.”)

bandwidth content does not prove that dial-up end users spend more time on-line than they did previously.

In fact, the estimates of growth presented by the BellSouth *ex parte* letter actually support the Commission's decision to eliminate the growth cap and new market restrictions by showing that the Commission's initial concerns about growth in dial-up traffic were unfounded. The BellSouth *ex parte* letter shows growth from 1.978 trillion minutes in 2004 to 1.980 trillion minutes in 2005 to a peak of 1.987 trillion minutes in 2006. These estimates represent average annual growth of a scant 0.23%. This figure is well below the estimate offered by the ILECs in 2001 of 40% annual growth, and even well below the estimate offered by CLECs of 7-10%.<sup>11</sup> It is clear that overall growth in dial-up ISP-bound minutes should be of very little concern to the Commission.

SBC now claims that lifting the new market restriction alone will result in a 20% increase in net reciprocal compensation payments. SBC Petition at 7. The Commission should take this statement with a large grain of salt. SBC offers no support for its 20% estimate. Some increase could hardly be surprising. If carriers were prevented from collecting compensation for providing a termination service for SBC when they entered new markets prior to the *Core Forbearance Order*, and then were permitted to collect compensation in those markets after the *Core Forbearance Order*, it follows that SBC's compensation payments will increase to some extent. Even if SBC's payments were to increase 20%, the amount owed to CLECs will be far below 2001 levels. The rates for compensation for the termination of ISP-bound traffic have been slashed from the average state reciprocal compensation rate of more than \$0.002/MOU

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<sup>11</sup> *ISP Remand Order* at ¶ 86.

down to \$0.0007/MOU, at least a 65% decrease. Pac-West would have to see a 286% increase in traffic just to offset this radical reduction in the compensation rate. With dial-up minutes declining, or at best plateauing, Pac-West would probably have to win the business of every ISP served by SBC to return to the compensation levels of 2001.

SBC's proposal to "offset the effect of the *Core Forbearance Order*" by lowering the rate of compensation below the rate of \$0.0007/MOU should also be disregarded. If the Commission had intended for there to be no net effect on CLECs, it would not have granted Core's Petition. And if the Commission intended to reflect changed circumstances in the market, the last remedy it should consider should be lowering the below-cost rate of compensation owed to carriers that terminate calls to ISPs, already the lowest rate of any form of intercarrier compensation.<sup>12</sup>

2. To support the SBC Petition, Qwest maintains that dial-up ISP-bound traffic has increased "dramatically" in Qwest's territory, and then provides a series of percentages to illustrate its case. Qwest Comments at 2-3. Yet Qwest's facts and figures appear in a vacuum of substantiation: how does Qwest determine what is "known ISP-bound traffic"? As the Commission is aware, ISP-bound traffic is indistinguishable from all other local traffic, and the only means provided by the Commission to identify ISP-bound traffic is to presume that traffic in excess of a 3:1 ratio is bound for ISPs.<sup>13</sup> Further, what were the baselines for Qwest's measurements of "known ISP-bound traffic"? Did Qwest measure only Qwest-to-CLEC "known ISP-bound traffic"? Did Qwest include traffic to its own ISP and to ISPs that Qwest served?

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<sup>12</sup> See letter from Richard R. Cameron, Counsel for Intercarrier Compensation Forum, to Marlene H. Dortch, Secretary, dated August 20, 2004, WC Docket No. 01-92, at 13.

<sup>13</sup> *ISP Remand Order* at ¶ 79.

Qwest's assertions of growth are meaningless without any explanation of Qwest's methodology and underlying data.

Qwest also makes the erroneous assertion that "without the incentive of regulatory arbitrage dampened by the 'new markets' and 'growth cap' rules, the normal ISP growth shifted naturally to broadband connections when economic considerations so dictated." Qwest Comments at 3. Likewise, SBC is wrong to contend that lifting the caps on compensation for ISP-bound traffic will cause ISP-bound traffic to increase. SBC Petition at 9. These statements assume that carriers that serve ISPs have the ability to dictate decisions to consumers of Internet access. In fact, the payment of terminating compensation to Pac-West has no effect on whether 56 kbps dial-up access is a sufficiently satisfactory product to the end user to justify spending the additional subscriber fee to upgrade to broadband. There simply is no causation between compensation to a CLEC for a call to an ISP and the decision by an end user to either increase the time spent on-line or to stop using circuit-switched connectivity altogether and switch to broadband.

3. In its December 17, 2004 *ex parte* letter, Verizon adds its weight but little substance to the SBC Petition by repeating the claims from the BellSouth *ex parte* letter, the SBC Petition, and the Qwest Comments regarding increases in "known ISP-bound traffic." Verizon Letter at 5-6. Verizon claims that its experience is similar to that of the other Bell monopolies, and its end users will generate 145 billion minutes of ISP-bound traffic to CLECs. Verizon Letter at 6. The truly absurd nature of the argument is demonstrated by the fact that even if this increase were demonstrated, this could mean a payment of a whopping \$101 million in intercarrier compensation payments for ISP-bound traffic to all CLECs interconnected with



Verizon nationwide.<sup>14</sup> But compared to the \$2 billion in reciprocal compensation that the *ISP Remand Order* purportedly helped Verizon avoid paying, someone other than Verizon could look at that \$101 million liability quite objectively and consider it a savings of 95% from the regulatory regime prior to the *ISP Remand Order*. An objective observer might also note that this \$101 million payment would be less than 0.15% of Verizon's 2003 revenues,<sup>15</sup> or less than two-thirds of the amount Verizon paid two of its executives from 1997-2003.<sup>16</sup>

Verizon also makes the argument that if dial-up ISP-bound minutes had actually declined, there would be no need to lift the growth caps. Verizon Letter at 8. This argument is flawed because it assumes that traffic carried by each carrier serving ISPs would decline when the overall balance declines. Yet it is simple enough to imagine that Pac-West could increase its share of dial-up ISP-bound minutes by competing for an ISP served by Verizon by offering improved quality or better customer service, yet that ISP could be experiencing a decline in total minutes. As noted above, Pac-West would have to see a 286% increase in ISP-bound traffic simply to offset the 65% reduction in the compensation rate. Verizon would obviously prefer to provide disincentives for Pac-West to compete for the service of ISP customers—such as compelling Pac-West to provide termination service without compensation when it takes an ISP customer from Verizon—because Verizon has never been interested in competing on a level playing field with Pac-West for service to ISPs. Verizon also fails to mention that any problems

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<sup>14</sup> 145 billion minutes x \$0.0007/minute = \$101,500,000.

<sup>15</sup> Verizon's total revenue in 2003 was \$67.7 billion.  
<http://finance.yahoo.com/q/is?s=VZ&annual>.

<sup>16</sup> See [http://www.cwa-union.org/verizon/exec\\_comp/#exec\\_pay](http://www.cwa-union.org/verizon/exec_comp/#exec_pay). Ivan Seidenberg, President and CEO, was paid \$78,890,600; Lawrence Babbio, Vice Chairman and President, was paid \$89,989,600.

it may have with paying other carriers to terminate calls to ISPs could be solved by working to win the ISP customer's business—but then Verizon would have to incur costs to terminate calls to ISPs, losing the enormous benefit Verizon gained by the *ISP Remand Order* of forcing its competitors to incur those costs without compensation.

Verizon claims that the policy rationales underlying the growth caps and new market restrictions remain as strong today as they did in 2001, and therefore continue to outweigh other Commission policies regarding a unified intercarrier compensation regime. Verizon Letter at 9. To Verizon, the Commission erred by not addressing each and every one of the policy rationales identified by Verizon as important to the issue. Of course, all of these policy rationales were wrong in 2001, and they remain wrong today, but Verizon's argument misses the larger picture. In fact, the Commission lifted the new market restrictions and growth caps because any foreseeable increase in dial-up traffic was not sufficient to outweigh the Commission's policies in favor of a uniform intercarrier compensation regime that was greatly impaired by the patchwork of rules created by the new market restrictions and growth caps. If the Commission's goal is to eliminate the myriad forms of regulation and compensation arrangements for providing the identical function of terminating switching in all cases—which the Commission has recognized incur identical costs<sup>17</sup>—it was a policy mistake not only to impose an entirely new form of regulation and compensation for a discrete type of traffic based on the identity of the called party, but it was an even greater mistake to slice and dice that new regulatory regime so that it would apply in some cases and to some carriers but would not apply in other cases and to other carriers. By lifting the growth caps and the new market restrictions from the *ISP Remand Order*, the Commission took a reasonable step in the right direction to provide some semblance

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<sup>17</sup> *ISP Remand Order* at ¶ 90.

of consistency to a regulatory regime that was ill advised to begin with and to provide some fairness to a compensation structure that was punitive to carriers that serve ISPs.

The Commission should deny the SBC Petition for Reconsideration and affirm the relief granted to the CLEC industry in the *Core Forbearance Order*.

Sincerely,

/s/

Richard M. Rindler

cc: Scott Bergmann  
Matt Brill  
Jeff Carlisle  
Monica Desai  
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